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SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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NO. 81 6235

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ALBERT "BO" THOMPSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

---

PETITION FOR WRIT OF CERTIORARI TO THE

SOUTH CAROLINA SUPREME COURT

---

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## QUESTIONS PRESENTED

1. Was the South Carolina Death Penalty Statute applied in Petitioner's case in such a manner as to constitute a violation of the Eighth Amendment's ban on cruel and unusual punishment?

2. Did the State of South Carolina, in its quest for a jury capable of imposing the death penalty, produce a jury uncommonly willing to condemn a man to die in violation of Petitioner's Sixth Amendment right to a fair and impartial jury?

3. Did the State of South Carolina, in denying Petitioner a change of venue, deprive Petitioner of life and liberty without due process of law?

TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Table of Authorities | iii |
| Introduction | 1 |
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Constitutional Provisions and Statutes Involved | 1 |
| Statement of the Case | 2 |
| Reasons for Granting the Writ: | |
| I. THE SOUTH CAROLINA DEATH PENALTY STATUTE WAS APPLIED IN PETITIONER'S CASE IN VIOLATION OF THE EIGHTH AMENDMENT AND IN CONFLICT WITH FURMAN v. GEORGIA | 3 |
| II. THE DEATH PENALTY WAS IMPOSED UPON PETITIONER BY A JURY SELECTED INVIOLATION OF HIS SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY | 4 |
| III. THE SUPREME COURT OF SOUTH CAROLINA HAS DECIDED THE FAIR TRIAL ISSUE IN DISREGARD OF THE PRINCIPAL OF IRVIN v. DOWD AND RIDEAU v. STATE OF LOUISIANA | 22 |
| Conclusion | 29 |
| Appendix: Opinion of South Carolina Supreme Court (November 23, 1981) | A |
| Corrected Opinion of South Carolina Supreme Court (January 7, 1982) | B |
| Order of the South Carolina Supreme Court denying the Petition for Rehearing | C |
| South Carolina Death Penalty Statute | D |

TABLE OF AUTHORITIES

CASES


| | Page |
|---|---|
| Adams v. Texas 100 S.Ct. 2521 (1980) | 4,5,12,14,17 |
| Boulden v. Holman 394 U.S. 478 (1969) | 5,16 |
| Burns v. Estelle 592 F2d 1297 (5th Cir. 1979) | 7,8 |
| Furman v. Georgia 408 U.S. 238 (1972) | 3,4 |
| Gregg v. Georgia 96 S.Ct. 2909 (1976) | 3 |
| Irvin vs. Dowd 366 U.S. 717, 81 S.Ct. 1639 (1961) | 22,28 |
| Lockett v. Ohio 438 U.S. 586 (1978) | 5,16 |
| Rideau v. Louisiana 376 U.S. 723, 83 S.Ct. 1417 (1962) | 22,28,29 |
| Smith v. State 55 Miss. 410 | 8 |
| State v. Bernard 218 S.E.2d 327 (N.C. 1975) | 7 |
| State v. Patterson 277 N.E.2d 101 (Ohio 1971) | 7 |
| State v. Woomer ___ S.E.2d ___ (S.C. 1981) | 18 |
| Witherspoon v. Illinois 391 U.S. 510 (1968) | 4,5,7,8,9, 11-18,21 |


STATUTES


| | |
|---|---|
| 28 U.S.C. §1257(3) | 1 |
| S.C. Code §16-3-20 | 1 |
| S.C. Code §16-3-25 | 1 |

## INTRODUCTION

The Petitioner, Albert "Bo" Thompson, respectfully prays that a writ of certiorari issue to review the judgment of the South Carolina Supreme Court entered in this case on November 23, 1981, on grounds that important questions of federal constitutional law are present on which there are conflicting decisions by the highest courts of other states and United States Circuit Courts of Appeals.

## OPINION BELOW

The first opinion of the South Carolina Supreme Court appears as Appendix A. The "corrected" opinion is attached as Appendix B. The order of the South Carolina Supreme Court denying the petition for rehearing appears as Appendix C.

## JURISDICTION

The judgment of the South Carolina Supreme Court was rendered on November 23, 1981. The Petitioner filed timely petition for rehearing which was denied on December 22, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(S. C. Code §§ 16-3-20 and 16-3-25 comprise the death penalty statute in South Carolina. Due to their length, these statutes are omitted here and attached as Appendix F.)

U. S. Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

U. S. Constitution, Amendment VIII:

> "Excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U. S. Constitution, Amendment XIV:

> "nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

## STATEMENT OF THE CASE

The Petitioner was indicted by the Greenville County Grand Jury on July 10, 1980, in two separate indictments. Indictment No. 80-GS-23-1888 charged Petitioner with armed robbery and Indictment No. 80-GS-23-1809 charged that Petitioner murdered one George Tobia while in commission of robbery while armed with a deadly weapon.

On June 17, 1980, the State served defense counsel with notice of its intention to seek the death penalty on the indictments returned by the Grand Jury. On July 21, 1980, the Honorable William W. Wilkins, Jr., the 13th Judicial Circuit Solicitor, called the cases against Petitioner for trial. Petitioner moved for and was granted a continuance until September 22, 1980. Trial of the case was commenced before a jury on September 22, 1980, and was concluded on September 27, 1980. The jury found the Petitioner guilty of murder and armed robbery and sentenced him to death. The presiding Judge C. Anthony Harris, set the date of execution for February 2, 1981.

The South Carolina Supreme Court, in Opinion No. 21596, filed November 23, 1981, affirmed Petitioner's conviction and sentence of death (Appendices A & B). The Petitioner filed a Petition for Rehearing which was denied on December 22, 1981 (Appendix C). Application for stay of remittur was granted pending disposition of this Petition (Appendix C).

## REASONS FOR GRANTING WRIT

### I.

### THE SOUTH CAROLINA DEATH PENALTY STATUTE WAS APPLIED IN PETITIONER'S CASE IN VIOLATION OF THE EIGHTH AMENDMENT AND IN CONFLICT WITH FURMAN v. GEORGIA.

In Gregg v. Georgia, 96 S.Ct. 2909 at Page 2917, this Court stated:

> "Petitioner's argument that the Prosecutor's decisions in plea bargaining or in declining to charge capital murder are standardless and will result in the wanton or freakish imposition of the death penalty condemned in Furman, is without merit, for the assumption cannot be made that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts; the standards by which prosecutors decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilty and sentence."

Prior to the trial of the Petitioner in this case, extensive plea negotiations were conducted between the State and attorneys for the Petitioner (TR Pages 1404 through 1406). These negotiations were brought about as the result of an indication by the Honorable William W. Wilkins, Jr., Thirteenth Judicial Circuit Solicitor, that the State would be receptive to plea negotiations. (TR pg. 1291, Line 21 through TR Pg. 1292, Line 3, also TR Pg. 1404, Paragraph 2). Petitioner's attorneys, feeling a sense of responsibility to keep their client informed of their discussions with the State, advised him to enter a plea of guilty. (TR Pg. 1284, Line 15 through TR Pg. 1287, Line 23). After a considerable amount of agonizing, Petitioner decided to plead guilty if the State would agree to a life sentence and this was communicated to the State on July 11, 1980, ten days prior to the date on which the trial had been scheduled to begin. (TR Pg. 1404, Paragraph 5) On Thursday, July 17, 1980, four (4) days before the trial was scheduled to commence and less than five (5) hours before the Petitioner was scheduled to enter his plea, the Petitioner's attorneys were advised that the State could not abide by the proposed agreement because the victim's family objected. (TR Pg. 1405, Paragraph 8 and TR Pg. 1287, Line 24 through TR Pg. 1288, Line 4) During all this time, Solicitor Wilkins had indicated that he would like to dispose of Petitioner's case by way of a guilty plea and life sentence. He maintained this position even up until the afternoon hours

on July 19, 1980, less than 48 hours prior to the time the trial was scheduled to begin. (TR Pg. 1287, Line 7 through Line 24) Thus it can be assumed that had the family been sympathic toward the Petitioner rather than vindictive, he would have received the life sentence. When the statute is applied, using such a standard, it flies directly into the face of this Court's holding in the case of Furman v. Georgia, 408 U.S. 238 (1972). It is capriciously, wantonly, and freakishly applied and is cruel and unusual in the same way as being struck by lightening is cruel and unusual.

II.

THE DEATH PENALTY WAS IMPOSED UPON PETITIONER BY A JURY SELECTED IN VIOLATION OR HIS SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY.

I. Introduction.

The changes in captial purnishment law that began with Furman v. Georgia, 408 U.S. 238 (1972), particularly with regard to the jury's role, have been considerable. However, Adams v. Texas, _____U.S._____, 100 S. Ct. 2521 (1980), made clear that Witherspoon v. Illinois, 391 U.S. 510 (1968), provides the only permissible way to distinguish among potential jurors on the basis of their beliefs and attitudes about capital punishment.

Witherspoon held that the jury could not be culled of all persons who revealed conscientious scruples or other opposition to the death penalty. Thus, under that case veniremen can be excluded for cause only if they make "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt", 391 U.S. at 522-23 n. 21 (emphasis added.)

During the voir dire examination of prospective jurors, the trial judge in Petitioner's case disqualified a total of four (4) jurors for various reasons having to do with their opposition to capital punishment. Of these, none indicated that his feelings against capital punishment would prevent him from returning a verdict of guilty and with the

possible exception of juror White, none of the individuals indicated that they were "so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme." Adams v. Texas, supra. In Adams, the Court held that the constitution disentitles the State to execute a death sentence imposed by a jury from which such prospective jurors have been excluded.

The Court in Adams pointed out that a line of cases beginning with Boulden v. Holman, U. S. 478, 483-484 (1969) and continuing through Lockett v. Ohio, 438 U. S. 586, 595-596 (1978) established "the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless these views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Adams v. Texas, supra, at pg. 2526.

II. Disqualification of jurors Allen J. Ravan, Samuel P. Clayton, and Elizabeth F. Leaque violated the minimum constitutional standards set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968), and for this reason, Petitioner's death sentence may not be carried out.

A) Juror Allen J. Ravan:

EXAMINATION BY SOLICITOR WILKINS (TR Pg. 747, Line 2 through TR Pg. 748, Line 14):

Q. And in that regard, let me ask you, are you opposed to capital punishment, generally speaking?

A. Mr. Wilkins, you've got me. I never had thought about it before. But, I would say yes.

Q. Does that mean that your feelings are such, Mr. Ravan, that if you were sitting on the jury, and an individual was convicted of a crime, for which the jury could give him capital punishment, or they could give him life, you would not be able to vote in favor of death by electrocution, you would have to vote for life inprisonment?

A. You mean, if the circumstances of a case that is given, relates directly to capital punishment, or to life imprisonment?

Q. Well, I mean this, assuming someone is guilty of a crime, let's say murder and armed robbery, for which the law says that capital punishment can be given by the jury, it doesn't have to be but it can be.

The jury then hears evidence from the State, trying to encourage the jury to invoke capital punishment. From the defense, trying to encourage the jury to vote for life imprisonment, and not vote for capital punishment.

A. I believe I would.

Q. So, regardless of what facts you heard about whether or not capital punishment should be imposed, or whether or not life imprisonment should be imposed, you would automatically vote then for life imprisonment?

A. No sir, I wouldn't automatic, I'd give it a lot of thought, but I wouldn't want to take nobody's life.

Q. Well, could you vote to take someone's life?

A. I don't believe so, I really don't.

Q. All right, sir, that means -- I think I hear you saying that regardless of the circumstances, not the circumstance of the crime and guilty or innocence, that's established, guilty. Regardless of what you hear about aggravation and mitigation, on the issue of what punishment to give, while you would consider both, you could not bring yourself to rais your hand and say "Electrocute him"?

A. No, sir, I don't believe I could. I really don't.

EXAMINATION BY MR. JONES (DEFENSE COUNSEL) (TR pg. 751, Lines 5 through 15):

Q. Would you be able to consider His Honor's charge on the law, consider, one, the death penalty on the one hand, and life on the other, could you consider the two alternatives?

A. Yes, sir, I understand what you're saying. But, it's like I'm saying, that the two alternatives to me would be that -- I would rather have a life sentence than I had the death sentence.

Q. I don't think there's anybody who might not rather have that. But, the question is, whether you can consider death versus

life?

A. Yes, I can consider that, yes. (See Witherspoon, P. 522 N. 21, infra)

EXAMINATION BY THE COURT (TR. Pg. 752 Line 17 through TR Pg. 753, Line 10):

Q. At that point, I would charge the jury the law and the circumstances under which they might return the death penalty. Does your opinion, and your belief, on the subject of the death penalty automatically prevent you from imposing the death penalty, no matter what evidence the State produces?

A. Yes, sir, I'm afraid so. That's the one thing that I was taught all my life, and I guess I've kinda hung to it since childhood, that "Thou shalt not kill". But, maybe the circumstances might be different, but with me, I don't think I could do it.

Q. All right, let me ask it another way, so I can be sure that I understand you and you understand me. Under the circumstances I've just explained to you, you and the other jurors would retire to consider the various evidence which has been presented to you. Would you be unwilling to vote for the death penalty under any circumstances, regardless of the facts that have been proven?

A. Yes, sir.

Q. All right, sir, you may be excused.

The voir dire examination of Mr. Ravan taken as a whole simply does not establish beyond question that this juror was "resolved to vote against the death penalty automatically and regardless of the evidence". Burns v. Estelle, 592 F. 2d 1297, 1300 (5th Cir. 1979), aff'd en banc 626 F. 2d 396 (1980). The juror's statement, "No, sir, I don't believe I could. I really don't", may indicate strong opposition to the death penalty, but it is ambiguous on its face, and cannot provide a basis for disqualification under Witherspoon. See State v. Bernard, 288 N.C. 321, 218 S.E. 2d 327, 330 (1975) (error to excuse juror who said he thought he would automatically vote against death penalty); State v. Patterson, 28 Ohio St. 2d 181, 277 N.E. 2d 201 (1971) (juror who repeated sixteen times that he did not think he could return a death verdict was properly qualified).

It is possible, of course, that further inquiry would have revealed an inflexible determination to vote against the death penalty in every case. But it is also possible, on the basis of this record, that further inquiry would have revealed some degree of flexibility in the juror's thinking. And since no further inquiry was conducted, the record does not support the disqualification. Burns v. Estelle, supra.

The Court should also note that at one point during voir dire, this juror stated that he would not automatically vote against the death penalty, (TR Pg. 748, Line 3). He then went on to state, "I'd give it a lot of thought, but I wouldn't want to take nobody's life." In Witherspoon at Page 515 N. 8, the Court compared a disqualified Witherspoon juror to jurors disqualified in Smith v. State, 55 Miss. 410, 413-414 and quoted from that case: "The declaration of the rejected jurors, in this case, amounted only to a statement that they would not like *** a man to be hung. Few men would. Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow man. ***For the error in improperly rejecting (these) two members of the special venire the case must be reversed."

Petitioner submits that the voir dire of Mr. Ravan indicated nothing more than an unwillingness to pronounce a sentence of death on a fellow human being as indicated by his response to the Court's final question. (TR Pg. 753, Lines 6 through 9). Through out the entire voir dire, he indicated that he could consider the two alternative punishments. "Just as veniremen cannot be excluded for cause on the ground that they hold such views (conscientious or religious scruples against death penalty), so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of

penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the fact and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." Witherspoon, supra, at Page 522 N. 21.

B) Juror Samuel P. Clayton

EXAMINATION BY MR. WILKINS (TR Pg. 291, Line 15 through TR Pg. 293, Lines 17):

Q. So, simply, are you opposed to capital punishment?

A. Mr. Wilkins, when I got the letter about this, that's something I've been struggling with in my own mind. From a distance, I'm in favor of capital punishment, or have always verbalized that. But when I got the letter and heard the statement that you had made on TV, that you were going to seek the capital -- it came home to me personally.

And to be completely candid with you and with the Court, I don't really know. Now, that sounds ambiguous, but it is a struggle that is going on in my mind right now.

I would have, to be honest with you, a hard time raising my hand to put somebody to death at this particular juncture in my life. You know, that's completely candid.

Q. Well, I - - -

A. You know, up until I got the letter, I was in favor of capital punishment, but when it came down to a personal decision, I'm somewhat in a quandary and hate to answer the question that way, but that's the only way I can truthfully answer it.

Q. I understand. Assuming you were seated on this jury, and you hear the case, assuming the defendant is found guilty, under the law then the jury must decide whether capital punishment shall be imposed, or whether a sentence of life imprisonment should be imposed. If you were on this jury, can you vote to impose capital

punishment?

* * *

THE WITNESS, Mr. Wilkins, I think - - I have a serious doubt in mind that I could raise my hand to vote for capital punishment.

Q. (By Mr. Wilkins) Regardless of the facts of the case, and I appreciate your position, now don't get me wrong, but regardless of the facts of the case, are you saying to us as specifically as you can, that you would not support a verdict - - you would not vote in favor of capital punishment, as opposed to life imprisonment?

A. Yes, I'm saying that.

Q. That you would vote in favor of life imprisonment, not capital punishment?

A. If my understanding of life imprisonment means life imprisonment, but that's almost a mute decision, because I would have great difficulty voting that way.

Q. You need to answer this question as specifically as you can.

A. Yes, I don't thing I could. I do not think I could vote for it.

Q. You do not think you could vote in favor of capital punishment?

A. That's right.

Q. Period?

A. Period.

EXAMINATION BY MR. JONES (TR Pg. 294, Lines 3 through 19):

Q. And, if the law, as he gives it, tells you that you can consider the implementation of the death penalty, or you have the alternative of a life imprisonment, could you consider capital punishment, if he charges you that's your two considerations?

A. Certainly, I could consider it, but I don't think I could vote for it. You know, it would be something that I could run through my mind, but I don't really think that if a conflict to my personal ethic and the law came about that I would yield to my personal ethic, as opposed to law, as written by State legislators.

Q. The Court does not ask you to yield to the law versus your ethics, the Court only asks that you consider the various options, you consider the death penalty and you consider life imprisonment, and you've indicated you could consider the two, is that correct?

A. Yeah, I could consider it.

EXAMINATION BY THE COURT (TR Pg. 294, Line 15 through TR Pg. 299, Line 3):

THE COURT: If the jury determines that the defendant is guilty of murder, it would then hear further evidence in a completely separate proceeding. You would hear evidence from the Solicitor and from the defendant, relative to the purnishment which is going to be imposed upon the defendant. One of those punishments might be the electric chair, if certain circumstances have been proven by the State.

Would your opinion, or your belief, or your personal ethic, as you described it, on the subject of the death penalty, automatically prevent you from voting to impose the death penalty, no matter what evidence the State presented?

A. Yes, sir, I think it would.

THE COURT: All right, sir, this gentleman is excused for cause.

The statements of Mr. Clayton like those of Mr. Ravan concerning capital punishment were always qualified. While he was somewhat opposed to the death penalty, his responses, like those of Mr. Ravan, simply indicated a reluctance to impose the ultimate punishment on a fellow man and certainly do not absolutely exclude the possibility that he would vote to impose it in a case which he found to be sufficiently aggravated. It's certainly more than worthly of note that this juror stated: "From a distance, I'm in favor of capital punishment . . . ." His exclusion was, therefore, in violation of Witherspoon.

Neither the voir dire of Mr. Ravan, nor that of Mr. Clayton, when considered in its entirety, can be said to have made "unmistak-

bly clear that [the jurors] would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them." Witherspoon v. Illinois, 391 U.S. 510,522 n. 21 (1968) (emphasis in original). What a juror "thinks" he could or would do cannot be substituted for the unmistakable and unambiguous expression of an abiding determination which is required by Witherspoon.

Each of these jurors may well be presumed from this record to be somewhat opposed to the death penalty. But "[it] is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." Witherspoon v. Illinois. 391 U.S. 510, 516-7 n. 7 (1968). The voir dire examination of jurors Ravan and Clayton does not unambiguously exclude this possibility, and thus their disqualification requires that Petitioner's sentence of death be set aside. Adams v. Texas, supra, at Pg. 2526.

C) Juror Elizabeth F. League:

EXAMINATION BY MR. WILKINS (TR Pg. 371, Line 2 through 12):

Q. Let me ask you this, are you opposed to capital punishment.

A. Yes, I am.

Q. Is your opposition such that you would not impose or vote to electrocute somebody, regardless of the circumstances?

A. I don't think I could.

Q. If you were asked to vote between life imprisonment and electrocution, would you vote for life imprisonment?

A. Yes, I would.

Q. Period.

A. Uh-huh.

EXAMINATION BY MR. JONES (TR Pg. 373, Lines 2 through 23):

Q. Are there different kinds of cases -- excuse me. There are different kinds of cases, would you agree with that?

A. Yes.

Q. And there are some cases that there -- involve violence, some cases don't involve violence. Some cases involve more violence than others?

A. Yes.

Q. Are there cases where you could apply the law as the Judge gives it to you, where you could apply the death penalty or life imprisonment?

A. Say that again.

Q. Could you consider, if you were asked to consider whether in this case, Albert Thompson received the death penalty or he received life imprisonment, could you consider the two options?

A. Yes.

EXAMINATION BY COURT (TR Pg. 375, Lines 6 through 14):

Q. Yes, Mam, and then I'm asking you, if that has been decided by you as a member of the jury, that he is guilty, you would then hear evidence as to whether he should be electrocuted or given life imprisonment. And I'm asking you, would your belief, your personal religious belief, as you yourself couched it, on the subject of the death penalty, automatically prevent you from voting to impose the death penalty on this defendant, no matter what evidence the State presents?

A. Yes, I think it would.

Q. All right, Mam, you may be excused.

Although somewhat more settled in her opposition to the death penalty than Messrs. Ravan and Clayton, in that she had made a previous decision on the issue, Ms. League too was qualified under Witherspoon. The voir dire taken as a whole simply indicates a citizen who would "hate to impose the death penalty because I think it's against my religion". (TR Pg. 373, Lines 14 and 15.)

"[It] cannot be assumed that a juror who describes himself as having 'conscientious or religious scruples' against the infliction of the death penalty or against its infliction 'in a proper case' (cite omitted) thereby affirms that he could never vote in

favor of it or that he would not consider doing so in the case before him. (Cites omitted.) Obviously, many jurors could, notwithstanding their conscientious scruples [against capital punishment], return *** [a] verdict [of death] and *** make their scruples subservient to their duty as jurors'. (Cite omitted.)" Witherspoon supra, at Page 515, N. 9.

III. Notwithstanding that the disqualification of these jurors may have been proper under Witherspoon, their exclusion certainly cannot be squared with the interpretation of Witherspoon, as set forth in Adams v. Texas, _____ U.S. _____, 100 S.Ct. 2521 (1980).

A) Juror Allen J. Ravan

EXAMINATION BY COURT (TR Pg. 745, Lines 15 through 21):

Q. Would you have any -- would you foresee any difficulty, from your own personal standpoint, of listening to the trial of the case, if you were accepted as a juror, listening to what was said from the witness stand under oath, and then taking the law as I give it to you, and rendering your verdict strictly on what happens in that courtroom?

A. No, sir.

EXAMINATION BY MR. JONES (TR Pg. 749, Lines 18 through 22):

Q. Would you have any hesitation, or would you be able to follow the Judge's instructions at the guilty or innocent stage, and make a decision whether or not Albert Thompson is guilty or innocent of the charges?

A. Oh, yes, I could do that, yes.

(And at TR Pg. 751, Lines 5 through 15):

Q. Would you be able to consider His Honor's charge on the law, consider, one, the death penalty on the one hand, and life on the other, could you consider the two alternatives?

A. Yes, sir, I understand what you're saying. But, it's like I'm saying, that the two alternatives to me would be that -- that I would rather have a life sentence that I had the death sentence.

Q. I don't think there's anybody who might not rather have that. But the question is, whether you can consider death versus life?

A. Yes, I can consider that, yes. (See Witherspoon, Pg. 522 N. 21, supra.)

B) Juror Samuel P. Clayton:

EXAMINATION BY THE COURT (TR Pg. 290, Lines 24 through TR Pg. 291, Line 6):

Q. If you were selected by both attorneys to serve as a juror on the case, would you have any problem whatsoever being seated at the commencement of the trial with a completely open mind and listening to the evidence, which is presented at that trial and then applying the law as I will give it to the jury, and rendering a verdict based on that evidence and that law?

A. No, sir, I don't think I would.

EXAMINATION BY MR. JONES (TR Pg. 293, Line 24 through TR Pg. 294, Lines 19):

Q. As I understand it, you told His Honor, when he asked the questions earlier, that you could apply the law as he gives it to the facts, of any case on which you sat, is that correct?

A. Yes, sir, that's my understanding, yes sir.

Q. And, if the law, as he gives it, tells you that you can consider the implementation of the death penalty, or you have the alternative of a life imprisonment, could you consider capital punishment, if he charges you that's your two considerations?

A. Certainly, I could consider it, but I don't think I could vote for it. You know, it would be something that I could run through my mind, but I really don't think that if a conflict to my personal ethic and the law came about, that I would yield to my personal ethic, as opposed to law, as written by State legislators.

Q. The Court does not ask you to yield to the law versus your ethics, the Court only asks that you consider the various options, you consider the death penalty and you consider life imprisonment, and you've indicated you could consider the two, is that correct?

A. Yeah, I could consider it. (See Witherspoon, Pg. 522, N. 21, supra.)

C) Juror Elizabeth F. League:

EXAMINATION BY MR. JONES (TR Pg. 372, Lines 12 through 23):

Q. Are there cases whereyou could apply the law as the Judge gives it to you, where you could apply the death penalty?

A. I would hate to impose the death penalty, because I think it's against my religion.

Q. Could you consider whether or not, in certain cases, whether or not to apply the death penalty or life imprisonment?

A. Say that again.

Q. Could you consider, if you were asked to consider whether in this case, Albert Thompson received the death penalty or he received life imprisonment, could you consider the two options?

A. Yes. (See Witherspoon, Pg. 522, N. 21, supra.)

"In Boulden v. Holman, 394 U.S. 478, 483-484 (1960) we again emphasixed the State's legitimate interest in obtaining jurors able to follow the law:

> '[I]t is entirely possible that a person who has a fixed option against or who does not believe in capital punishment might nevertheless be perfectly able, as a juror, to abide by existing law--to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.'

And in Lockett v. Ohio, 438 U.S. 586, 395-396 (1978, we upheld against a Witherspoon challenge the exclusion of several jurors who were unable to respond affirmatively to the following question:

> 'Do you feel that you could take an oath to well and truly [sic] try this case . . . and follow the law or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?'

This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that

jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the Court." Adams v. Texas, supra. Petitioner submits that his simply means that a State has a legitimate interest in acquiring jurors who are not so opposed to imposition of capital punishment as to frustrate its legitimate efforts to administer its laws.

However, the Constitution disentitles the State to execute a sentence of death imposed by a jury from which prosepctive jurors have been excluded who are not so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme. Adams v. Texas, supra.

> "[I]f prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out. Adams v. Texas, supra, at Page 2527.

IV. The trial judge refused to excuse two (2) prospective jurors who, during voir dire examination, had indicated an unwillingness to vote for a life sentence in Petitioner's case.

The voir dire examination of potential juror Heyward R. McCall, when taken as a whole, made unmistakably clear that should the State prove Petitioner guilty of murder in the commission of armed robbery beyond a reasonable doubt, he would automatically vote for the death penalty. (TR Page 720, Lines 1 through 5 and TR Page 721, lines 8 through 12). This juror "fell woefully short of that impartiality to which the Petitioner was entitled under the Sixth and Fourteenth Amendments." Witherspoon, supra, at Page 518.

The Court further erred in its effors to rehabilitate this pro-death juror. The Court stated at Page 721, Line 4 of the transcript: "The defendant would put in any evidence which he wishes to whatsoever, which they think would convince you to sentence him to life imprisonment." Thus, the implication was that the Petitioner would present evidence in mitigation. If the Court were going to rehabilitate this juror, he should have further questioned him concerning his vote on the life imprisonment alternative in the

event Petitioner did not put up any evidence in mitigation, and the State proved one or more aggravating circumstances beyond a reasonable doubt.

"We have interpreted this State's death penalty statute to require the Trial Judge instruct the jury that it could effectively impose life imprisonment instead of death even if it found one or more statutory aggravating circumstance(s). State v. Woomer, Opinion No. 21442 (S.C. Sup. CT. filed 4-28-81). Thus, the Court failed to determine whether or not the juror could grant the Petitioner his life under these circumstances. If effect, the Court told this juror that the burden was on Petitioner to present evidence which would convince him (the juror) to spare Petitioner's life.

The following voir dire of juror Erma P. Prickett indicated that she too "fell woefully short of that impartiality to which the Petitioner was entitled under the Sixth and Fourteenth Amendments." Witherspoon, supra.

EXAMINATION BY MR. GREENE (TR Page 597, Line 18 throught TR Pg. 601, Line 18):

Q. Tell me how you feel about capital punishment.

A. I think there are definitely cases where it is deserved. Our society runs by certain rules and if people break those rules they should pay a penalty. And, depending on what rules they break, depends on the penalty.

Q. In what type situations would you impose the death--would you believe the death penalty should be imposed: You said there's some circumstances.

A. For someone for murder, that would be the main one. There may be other things that I would think it would be a good sentence for, also.

Q. In a situation where death occurred while in the commission of an armed robberty, would that be one of the areas you would consider ---

A. Yes.

Q. And do I understand that it were established that the armed robbery occurred and murder, and death ensued as the result of that, you would vote the death penalty?

A. Yes, I would.

Q. You don't have any question about that?

A. No.

Q. In those circumstances where there's an armed robbery and death as a result of the armed robbery, as a part of it, regardless of exactly how it came about, your vote would be for the death penalty?

A. I believe it would.

(TR Pg. 601, Line 3)

Q. As I explained to you when we first started talking this is a case in which the Solicitor is seeking the death penalty.

A. Yes, sir.

Q. And I asked you to be as candid with me as you can, which you already have been. If, in a situation where it was proven beyond any doubt, by the tremendous weight of the evidence, that a man who was charged with murder and armed robbery was, in fact, guilty of murder while in the commission of armed robbery, do I understand that your vote would be for the death?

A. Yes, sir.

Q. And, while the Court would give you the option of choosing between life and death, in all fairness, your vote would definitely be for death?

A. Yes, sir.

EXAMINATION BY THE COURT (TR Pg. 603, lines 12 through 23):

Q. I also tell you this, then, that in the charge, no matter what the evidence, I would instruct the jury that you may return a verdict of life imprisonment, if in your best judgment that is the purnishment which he should receive, no matter what the Solicitor introduces as evidence.

A. Right.

Q. Does your opinion relative to the desirability, the feasibility of the death penalty in South Carolina, would it prevent

you from going into you jury room and considering the evidence that has been presented, in light of my charge that a juror may return a verdict of life imprisonment, regardless of any evidence presented by the Solicitor, would it prevent you from giving serious consideration, or from returning a vote of life imprisonment in this case?

A. It would not prevent me from giving it serious consideration. However, I feel that if it has been proven to me that he was guilty, that I would vote for the electric chair.

FURTHER EXAMINATION BY THE COURT (TR Pg. 611, Lines 14 through 24):

The defense will present such evidence as it wishes to, on mitigating circumstances, which they wish to impress upon you as being a reason for not imposing the death penalty on this young men.

You would then retire to consider your verdict.

Q. Depending upon the evidence which has been presented at that state of the trial, could you vote for life imprisonment in this case.

A. I could, yes.

Q. All right.

A. Depends on the mitigating circumstances.

This juror's attitude was best expressed by this last colloquy. She was adamant to the end about imposing the death penalty on a convicted murderer. The Trial Judge himself best summed up her feelings at TR Pg. 612, Line 10, when he stated: "All you have here is a witness who's strong for law and order, and who says 'you'd better show me an awful good reason not to put him in the electric chair',...."

Petitioner submits that the burden does not shift to him once the State has proven one or more aggravating circumstance to put up some evidence in mitigation to convince a jury to impose a life sentence. In rehabilitating both of these pro-death jurors, the Court erred in stating that there would be mitigating evidence introduced by Petitioner.

The Petitioner would invite this Court to compare the Trial Judge's efforts to rehabilitate these two jurors with his efforts to rehabilitate the four (4) who were excused for their opposition to capital punishment. Petitioner submits that it is evident from such comparison that those jurors who expressed some opposition to imposition of the death penalty were excused by the Judge while those who expressed pro-death sentiments were found qualified. Whether this was intentional or unintentional on the part of the Trial Judge, it resulted in the same effect - a jury weighted in favor of imposition of capital punishment as opposed to a jury neutral on this issue. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

"Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the Petitioner. To execute this death sentence would deprive him of his life without due process of the law." Witherspoon, supra, at Page 523.

Petitioner submits that by failing to exclude these two jurors and by excluding those four (4) previously discussed, the State of South Carolina stacked the deck against him and to execute his death sentence would deprive him of his life without due process of law.

III.

THE SUPREME COURT OF SOUTH CAROLINA HAS DECIDED THE FAIR TRIAL ISSUE IN DISREGARD OF THE PRINCIPAL OF IRVIN V. DOWD AND RIDEAU V. STATE OF LOUISIANA.

The Supreme Court of South Carolina has adopted a rule in dealing with pre-trial publicity that in effect, precludes any real inquiry into the facts of a particular case. That rule, as stated in the opinion below, is as follows:

"Where the Trial Judge bases his rule on adequate voir dire examination of the jurors, his conclusion will not be disturbed absent extraordinary circumstances." The Trial Judge found the members of the jury to be impartial by reason of their promise to follow his instructions and render the State and the Defendant a fair trial. The Supreme Court of South Carolina accepted the Trial Judge's finding without any real inquiry into the facts of this particular case. That there was no real inquiry into the pre-trial publicity facts of this case is apparent when one compares the language of the opinion to the record. While the Court below dismissed Petitioner's claim of error in one paragraph, the record reflects numerous exhibits and testimony which were fully briefed for the Court showing a pattern of State generated publicity carefully orchestrated to deny the Petitioner a fair trial. The Court below made only one reference to the pre-trial publicity facts, that being "that several newspapers and radio stations reported the incident". There certainly was a tremendous amount of newspaper, television, and radio coverage. The alleged incident was, however, described in quite different terms. What really happens is as follows:

On July 10, 1980, Petitioner was indicted by the Greenville County Grand Jury with the charge of armed robbery and murder. One day before, July 9, 1980, Appellant had been convicted of armed robbery in the adjoining Court of Pickens. On July 17, 1980, the State had served defense counsel with its intention to seek the death penalty. Counsel herein had been representing Appellant one day when the notice was served. Between the receipt of the notice and while attempting to prepare to represent the Petitioner in his

death penalty case, which had been set for trial on July 21, 1980, the State forced the Appellant to trial in Pickens County on the armed robbery charge. The events surrounding the Pickens trial and the death penalty trial were fully covered by both newspaper and radio. The State does not contest that the newspaper and radio stations that covered these events fully blanketed both Greenville and Pickens County. Publicity fully detained Appellant's conviction of armed robbery, his arrest in New Jersey and extradition fight, the related hearings pertaining to both the armed robbery and pending death penalty trials, including a confrontation with the press at Appellant's preliminary hearing, and the action on the part of Appellant's counsel to obtain the disqualification of the Judge who had heard the Pickens case and who was to try the death penalty case. When the death penalty case was called on July 21, 1980, Appellant moved for, and was granted a continuance until September 22, 1980. A change of venue (other than the adjoining County) was requested but denied. Counsel had been in the case for approximately 34 days when the events occurred in July. Between the publicity in July and following the continuance, the news media was particularly quiet concerning the Defendant. In fact, nothing was said pertaining to the Appellant's death penalty case until three days before he was to go on trial for his life on September 22, 1980. On Wednesday night, September 17, approximately 11:15 p.m., the Appellant was served with a warrant charging him with assault and battery with intent to kill resulting from an incident which had allegedly occurred on Monday, September 15, 1980, in the Detention Center. WFBC Television, the Channel 4 NBC affiliate, broke the story and predominated in its coverage. There is no contest on the part of the State that WFBC AM and FM radio and television stations are major stations in the Greenville area. There are seven stories that were aired on the radio stations, AM and FM on September 18th and 19th. Stories referred to the Petitioner by name, and stated that he and another had been charged with "beating and stabbing another prisoner", that he was "already serving time for armed

robbery and was going on trial for armed robbery and murder on Monday". The stories also referred to the Petitioner "beating another inmate" and that the "beating occurred Monday, and that Stewart was hospitalized and could not give a statement until Wednesday night . . . Thompson is already serving a prison term for a Pickens County armed robbery". A police captain, by the named of Earl Watson, granted an interview to the station explaining why it had taken three days to file charges and this interview was carried along with the stories. On Monday morning, September 22, 1980, the date set for the beginning of jury selection, these stories continued. "News stories last week told of convicted armed robber, Albert "Bo" Thompson, getting arrested for allegedly beating and stabbing a cell mate in the county jail, well, Thompson's lawyer, Tom Greene, argues that his client cannot get a fair trial because the stories have prejudiced prospective jurors. Thompson has already been convicted of a Pickens County armed robbery, and today's trial is on the 1978 armed robbery-murder of a Simpsonville grocer, George Toubia." The stories also stated that "It was the second time the trial was slated to start, because Thompson's lawyers got a continuance two months ago and there could be more delays today." Other stations in the same geographic area carried stories referring to the "stabbing incident" and reminded listeners that Thompson was to go on trial in a few days for his life for the murder and armed robbery. The local newspaper, on September 18th and 19th, 1980, carried stories relating to the detention center incident as " a stabbing attack" and referred to the use of a "dagger". Another article in the Greenville News captioned, in "Thompson Trial - Venue Change Sought" and outlined for the reader the alleged attack on the prisoner in jail and the pending death penalty trial. The newspaper articles reminded the readers of Appellant's extradition from New Jersey, particulars of the crime for which he was to go on trial and the July 9, 1980, Pickens conviction of armed robbery. On September 23, 1980, the Greenville News, in a article captioned, "Judge Refuses to Move Thompson Trial", outlined the assault with the intent to kill charge, stated that the

Judge described the charges as "straightforward, factual reporting as the news media can do". The story, run by WFBC Television on the 6:00 o'clock and 11:00 o'clock news on Thursday evening, September 18, 1980, was their lead story and contained, in addition to narration by a reporter, a video tape of the Appellant walking through the lobby of the Law Enforcement Center in prison clothes, smiling with a cigar in his mouth, his hands in cuffs, and being accompanied by an officer and counsel, this being filmed in the lobby of the Greenville County Law Enforcement Center. The reporter who obtained the story received her information from a confidential source and refused to reveal that source. The Trial Court sustained her refusal, over counsel's objections, maintaining that she had the right to so refuse. The same captain that had given the interviews, also told her where to stand with her camera to obtain pictures of the Defendant. For the Supreme Court of South Carolina to say that "he (the Petitioner) and an inmate were involved in an altercation" and that several newspapers and radio stations reported the incidents clearly establishes that the Court disregarded the effect of the actual publicity on potential jurors. The statement of the South Carolina Supreme Court that the Petitioner was involved in an altercation in effect amounts to a finding of fact that he did in fact engage in such altercation, when it has never been proven in any Court at any time, that the Petitioner did, in fact, do anything. In fact, when counsel attempted to demonstrate to the Trial Court that the allegations were grossly untrue, the Trial Judge made it clar that such would not be tolerated by simply stating that he was not going to try an assault and battery case before he tried the death penalty case.

The likelihood of further violence from the Defendant, not only after possible parole but within the prison system itself, is a major consideration for death penalty jurors when they are deciding whether or not to grant life. It would, therefore, be difficult to imagine a more damaging charge than that brought against the Defendant just hours before going on trial for his life. It should also be remembered that at this time jurors for the case

had their jury summons in hand and knew that they might serve. It should also be noted that all of these events, starting with the initial trial date, are directly traceable in one way or another to the State of South Carolina, and if closely examined, demonstrate a consistent pattern on the part of the State to create an environment calculated to insure the imposition of the death penalty. It was the Solicitor who called Petitioner's cases as described. It was the State of South Carolina who brought the assault and battery with intent to kill charge within a matter of hours before the Appellant was to go on trial for his life. Police Captain Watson was actively involved in disseminating the information concerning the alleged incident, information that was both inflamitory and inaccurate and that the Appellant was never given an opportunity to refute. It is also clear from the record that, having made the charge within a few hours of the time that the Appellant was to go on trial for his life, someone described as a "confidential source" made sure that the local television station knew of the event. Under these circumstances, the Trial Court should have automatically granted a continuance or changed the venue without further inquiry. As one looks at the voir dire, it should be kept in mind that jurors are reluctant to admit prejudice and in any instances, are unaware of the impact of what they know until it is too late. The jurors who signed Petitioner's death warrant were far from unaware of the publicity, as can be seen by an examination of their voir dire. Martha Childress heard that "he was to be tried and he was pleading innocent." Frances Collins heard about the incident when it first happened in July of 1978; that a man had been killed and robbed and that her husband and daughter had mentioned the name of the deceased and the Defendant". (The first time that the Appellant's name was publicly mentioned in connection with the murder and armed robbery of the deceased was approximately one year after the incident.) Elizabeth Dunson saw the newspaper coverage of the alleged assault in prison and motion of change of venue. When asked if what she read had any effect on her, she replied, "No, I don't think so." James Finch remembered only reading the "headline in the paper"

when it first happened, yet he was able to associate Appellant's name with the incident which would be impossible if his only exposure was to the initial report. Faye Goodwin also read about the assault case at the Law Enforcement Center. Marg Gerwood remembered an article that she read after she received her subpeona, "just for what the trial was going to be, but that was all". Ilean Jackson recalled from the paper that a man had been killed and robbed, and the Appellant's name was connected with those events. Priscilla Wilson, when asked what she had heard or read, said, "Nothing since we've been down here, I 'aint hearded much about it, I haven't paid too much attention about it. . . ." Some of the jurors who did not serve were more candid about their reactions to the publicity. Their reactions are, it is submitted, normal and predictible and should be considered in evaluating the total probable impact of these events. James Lyon heard on the radio about the "fight" at the Law Enforcement Center, and said, "I guess it made the impression that he is capable of, you know, trying to kill someone....I guess it would always be in the back of your mind...." The juror also said that he assumed that what the radio report had said was true. (Court excused this juror.) Doris Culbertson saw the Appellant on television and her reaction was, "you saw someone who had been involved in a crime". Novice Johnson read in the paper concerning the Law Enforcement Center incident and described it, "Well, where he tried to kill another man, tried to stab this man". Lucille Floyd read and heard about the Law Enforcement Center incident and described her feelings, "I thought, gosh, you know, I'm surprised that that happened, since he already, you know, going to be tried for murder. I'm surprised that he would do that". When asked if she thought Petitioner had done what they though he had done, she replied yes. When asked her reaction to the film clip, she said, "I was suprised that he was smiling" and further stated that "I guess I thought he knew that they were, you know, the camera was on him, and I gues that I was surprised that he was smiling, you know, knowing that everybody in Greenville, or whoever, was watching television on Channel 4 was going to see him." Appellant submitted a number

of affidavits from Greenville County citizens as well as attorneys which stated that they did not believe that the Petitioner could be given a fair trial due to the publicity.

The twelve jurors who signed the death warrant knew about the case and admitted some exposure to the publicity in question. Two of the jurors knew about the alleged assault at the Law Enforcement Center.

The failure of the Supreme Court of South Carolina to consider the actual facts is a procedure that is in direct violation of the holding in Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 (1961) at Page 1642, this Court stated that to hold that a mere existence of any preconceived notion as to guilt or innocence of an accused without more is sufficient to rebut the assumption of a prospective juror's impartiality is to establish impossible standards. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in Court . . . The adoption of such a rule, however, cannot foreclose inquiry in a given case where the application of that rule works for the depravation of a prisoner's life or liberty without due process of law. In Rideau v. Louisiana 373 U.S. 723, 83 S.Ct. 1417 (1962), this Court held that the refusal of a request for a change of venue was a denial of due process where a moving picture film with sound-track had been made of Defendant's confession of a crime for which he had been charged. The film in question had been televised three times and three members of the jury stated on voir dire that they had seen and heard the interview on at least one occasion. Notwithstanding their testimony that they could "lay aside any opinion, give the Defendant the presumption of innocence that is provided by law, base their decision solely on the evidence, and apply the law as given by the Court," (Rideau, supra, at page 1422) this Court held that the denial of a change of venue was a denial of due process of law. At least two jurors on Petitioner's jury knew about the alleged incident at the Law Enforcement Center, and the balance of the jury had substantial information concerning his many troubles.

While they all asserted their impartiality as did the Rideau jurors, it is submitted that a death sentence for the Petitioner from this jury violates the concepts of fundamental fairness and due process of law.

## CONCLUSION

For all of the foregoing reasons, a writ of certiorari should be issued to review the Order of the Supreme Court of South Carolina.

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